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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 148

JACOB MARCUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EUGENE A. TAPPY,
30 N. La Salle Street,
Chicago, Illinois,

LEO KLEIN,
10 S. La Salle Street,
Chicago, Illinois,
Attorneys for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Jacob Marcus, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on May 20, 1954, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

THE OPINION BELOW.

The Court of Appeals for the Seventh Circuit affirmed the judgment sentencing the petitioner to the custody of the Attorney General for a period of five years and fined him $2,000.

The opinion has not yet been reported. It appears in the record at pages 52-56.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

DATE OF JUDGMENT.

The date of the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court for the Northern District of Illinois, Eastern Division was May 20, 1954.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in sustaining the action of the District Court in refusing to hear defendant's counsel on his motion to withdraw defendant's plea of guilty constituted an abuse of discretion.

2. Whether the Court of Appeals erred in sustaining the District Court in refusing to allow defendant to withdraw his plea of guilty and in overruling the motion to change the plea.

3. Whether the Court of Appeals erred in not ruling on the alleged abuse of District Court in refusing to hear defendant's counsel in mitigation of punishment before sentencing defendant on his plea of guilty.

SUMMARY STATEMENT OF MATTER INVOLVED.

The record is lengthy, but the fact necessary to a disposition of this proceeding may be recited quite briefly.

Petitioner was indicted on Four Counts of a 25 count indictment including 3 other defendants. Upon a plea of guilty entered to count 25, charging conspiracy to violate the Narcotic Law, the 3 other substantive counts were dismissed on motion of the Government.

The plea of guilty was entered on September 17, 1953, and was continued to October 22, 1953, at which time defendant moved for leave to withdraw the plea of guilty and to enter a plea of not guilty pursuant to rule 32 (d) of the Rules of Criminal Procedure.

This motion was denied, and after defendant's counsel stated to the Court that he wanted to be heard in mitigation and the Court replied he would let him talk if he can accomplish anything for defendant, the Court immediately imposed the maximum sentence upon defendant.

REASONS FOR ALLOWANCE OF THE WRIT.

The petitioner contended and argued in the Court of Appeals that there was a clear abuse of the discretion vested in the District Court in denying the motion to withdraw the plea of guilty, and in summarily and arbitrarily imposing the maximum sentence immediately after denying the motion to withdraw the guilty plea without giving petitioner's counsel an opportunity to be heard in mitigation of punishment under the plea.

Petitioner does not dispute that the District Court has the right to exercise its sound discretion in passing upon the motion to withdraw a plea of guilty.

The motion to withdraw the plea of guilty in compliance

with rule 32 (d) of the Rules of Criminal Procedure was made before imposition of sentence.

The authorities cited are practically unanimous in holding that the rule should be liberally exercised so as to afford a defendant a trial on the merits and to promote the ends of justice and safeguard the liberty of those charged with crime.

The Court of Appeals affirmed the ruling of the District Court on the sole ground that there was no abuse of discretion and no error in denying the motion; also, that the defendant's complaint that sentence was imposed without hearing matters in mitigation had not been asked for by motion by defendant's counsel and that therefore no ruling was asked for or preserved for review as to that matter (op. p. 5.)

Respectfully submitted,

EUGENE A. TAPPY,
30 N. La Salle Street,
Chicago, Illinois.

LEO KLEIN,
10 S. La Salle Street,
Chicago, Illinois,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In *Kercheval* v. *United States,* 274 U. S. 220, at page 224 this Court stated: "The Court in the exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial *if for any reason the granting of the privilege* seems fair and just." (Italics supplied.)

In *United States* v. *Lias,* 4 Cir. 173 Fed. (2) 685, *after* sentence upon a guilty plea the defendant filed a motion supported by affidavit on the ground he was misled by statements made by the trial judge to his counsel. The Government appealed from the order granting the motion to withdraw the plea. While the Court of Appeals, in citing *Kercheval* v. *United States, supra,* pointed out that a defendant, properly advised, may be bound by his plea, nevertheless, the opinion went on to state at page 688:

> "The Court in the exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."

In *Roberto* v. *United States,* 7 Cir. 60 Fed. (2) 774, although the judgment was affirmed on the ground that the accused knew the nature of the charges against him and also knew that he was guilty, the Court of Appeals in a *per curiam* opinion stated at page 775:

> "With cases like the present one courts are confronted by a situation which calls for a sane and practical application of the rules of pleading and the effect of admissions therein made. * * *
>
> "Such a plea necessarily involves an admission of guilt. If such a plea is inadvisedly made, or is contrary to the truth, the accused shall not be held strictly to his plea. He should be, and as far as our observation goes, he is, permitted to change the plea * * *."

In *United States* v. *Bergen,* 8 Cir. 145 Fed. (2) 181, the judgment of the trial court denying defendant's motion to withdraw his plea previously entered without counsel was reversed. While the facts in regard to the presence of counsel do not exist in the case at bar, the principles of law enunciated in the opinion illustrates the theory in these cases. At page 187, the Court said:

> "While the burden is on the accused to show cause for the change of his plea, the Court's discretion should be exercised liberally so as to promote the ends of justice and to safeguard the life and liberty of the accused, especially where the defendant is without the advice of counsel and his motion is reasonably made. And in any case, the motion should not be denied where it is evident that the ends of justice would best be served by granting it."

The foregoing cases illustrate general liberality sought by our courts, both Federal and State, to protect and safeguard the liberty of one accused of crime so as to promote the ends of justice. To that end, as stated, the discretion should be exercised liberally and unless so exercised the abuse of that discretion should not be sustained by the high courts on appeal.

Petitioner here having been refused by the District Judge an opportunity to make a showing that he should be permitted to withdraw his plea and have a trial upon the merits, it follows that petitioner was denied that privilege and there was no basis for denying his fundamental right to a trial on the merits and we respectfully submit that the trial court abused its discretion in this case.

Petitioner respectfully submits that the Court of Appeals was in error in the matter of mitigation which petitioner had contended was an abuse of the District Court's discretion; defendant's counsel was assured by the District Judge that he would have an opportunity to be heard in mitigation and in fact the District Judge stated "• • •

but I will let you talk without limitation after a plea in mitigation" (Tr. 12); in addition, defendant's counsel requested to be heard in mitigation on three specific occasions. (Tr. 13, 17, 37.)

Petitioner respectfully submits that to summarily deny leave to withdraw the plea of guilty and immediately inflict the maximum penalty upon petitioner without hearing a single word in mitigation of punishment, constituted, in the light of the record, an abuse of discretion, which should not be passed on lightly or quickly condoned.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EUGENE A. TAPPY,
30 N. La Salle Street,
Chicago, Illinois.
LEO KLEIN,
10 S. La Salle Street,
Chicago, Illinois,
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 148

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 52-56) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1954 (R. 56). The petition for a writ of certiorari was filed on June 18, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the trial court abused its discretion in denying petitioner's motion to withdraw his plea

of guilty, which he had previously entered upon advice of competent counsel of his own choosing, voluntarily and without reliance on any promise.

RULE INVOLVED

Rule 32(d), F. R. Crim. P. provides:

> WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

On February 8, 1952, a twenty-five count indictment charging violations of the narcotics laws was returned against petitioner and others in the United States District Court for the Northern District of Illinois, counts 4, 5, 6 and 25 of which involved petitioner (R. 3-5).

On September 17, 1953,[1] petitioner, who had previously pleaded not guilty, appeared before the court with his attorney, Mr. Welfeld (R. 8). Mr. Welfeld indicated that his client was "considering the question of pleading guilty" (R. 8) but that he "as a lawyer trying to do a conscientious job" was concerned with the penalty provisions of the narcotics law which imposed heavier penalties

[1] The case originally had been set for trial in December, 1952 (R. 6).

where the defendant was a second or third offender (R. 9). In a lengthy colloquy which followed, the judge stated that he would not bargain about the disposition of a case in the event of a plea of guilty, although he felt that a defendant who pleaded guilty was entitled to some consideration. He suggested that if Mr. Welfeld had any doubts, he should not allow his client to plead guilty, and said that he would let counsel "talk without limitation after a guilty plea in mitigation." (R. 9-12.) Thereupon, Mr. Welfeld said that "I think there will be a plea, so that we might as well dispose of it" (R. 12).

After the luncheon recess, Mr. Welfeld said that petitioner would plead guilty and the Government indicated that it would move, in view of petitioner's plea, to dismiss counts 4, 5 and 6 against him (R. 14). When the Government also stated that it would file an information against petitioner which would charge him as a second narcotics offender, the court said it would not hear a statement in mitigation until "the matter of the warning" and the plea were properly put in the record (R. 14-15, 17).

After explaining in detail petitioner's right to a trial by jury the Court said (R. 18-19):

> Now, I will tell you also that in the event you persist in your plea of guilty to this count, as the record now stands, the court could sentence you to five years in the custody of the Attorney General of the United States, and if the United States Attorney files the informa-

tion which you heard discussed here a few minutes ago, and the facts in that information are either admitted or established to the satisfaction of the court, the court could sentence you to a term not to exceed twenty years in the custody of the Attorney General, and also fine you up to $10,000.

Now, with that information and warning, do you still persist in your plea of guilty to this count?

Mr. Marcus: I take it if I plead guilty, I will be given consideration for the fact that I helped the Government. This has been pending two years.

The Court: I won't bargain with you.

Mr. Marcus: No, sir.

The Court: If you want to take a minute to consult with your lawyer.

Mr. Marcus: No, I am up in years. I would rather get it over with.

The Court: I do not have to tell you that you know you are charged with a serious offense.

Mr. Marcus: This is the first time I ever heard of some of these things.

The Court: I won't discuss this case with you until I determine whether you persist in your plea of guilty. You have able counsel. If you want to consult further with him, you are at liberty to do so.

Mr. Marcus: No, I would rather let it stand as it is.

The Court: What does that mean?

Mr. Marcus: A plea of guilty.

The Court: Mr. Welfeld, in the light of my warning, do you still want to advise your client to plead guilty?

Mr. Welfeld: Yes, your Honor, I do.

The Court: All right, will you let the record show, Mr. Clerk, that as to Count 25 of the indictment, the defendant, Jacob Marcus, is given leave to withdraw his plea of not guilty, and leave to plead guilty to that count. [See also R. 7.]

As to the other counts in which the defendant Marcus is mentioned, being Count 4 and Count 5 and Count 6, I understand that Mr. Tobin of the Government moves to dismiss those counts as to the defendant Jacob Marcus.

Counts 4 through 6 were thereupon dismissed (R. 7, 19) and the case was continued to allow the Government to file the required information (R. 19).

When the case came up for final disposition on October 22, 1953, Mr. Welfeld unsuccessfully (R. 35) moved under Rule 32(d), F. R. Crim. P. to withdraw petitioner's plea of guilty (R. 34-35). Thereupon a discussion followed as to the charge in the information (R. 39-40) submitted by the Government that petitioner was a second narcotics offender. During this discussion, the court said that it appeared that petitioner "has had quite a

[criminal] career." In an attempt to defend petitioner's record, Mr. Welfeld said that petitioner, who was then sixty-four years of age, had been a narcotics user from the age of fourteen and his history was no different from that of any long time user. (R. 35-37.)

The following ensued (R. 37):

> The Court: Putting aside the criminal information you filed here, what is the penalty under this Count 25?
>
> Mr. Tobin: Without the additional information, it is up to five years, and a fine of $2,000.
>
> Mr. Welfeld: I do want to be heard in mitigation, if your Honor please.
>
> The Court: I will let you talk, if you can accomplish something for your client, Mr. Welfeld. You don't want him to receive any additional punishment under the criminal information.
>
> Do you want to be heard on that?
>
> * * * * *
>
> The Court: This man is how old?
>
> Mr. Welfeld: He is 64 years old. He has been an addict for over fifty years.
>
> The Court: I will let the Government file the criminal information. We won't impose any additional penalty by reason of it.

The court then sentenced petitioner to imprisonment for a period of five years and to a fine of $2,000 (R. 37, 41).

On appeal, the Court of Appeals held that (R.

56) "there was no abuse of discretion and no error in denying the motion" for withdrawal of the guilty plea.

ARGUMENT

It is clear from the Statement, *supra,* that petitioner's contention (Pet. 3-7), that the trial court abused its discretion in denying his motion for leave to withdraw his plea of guilty, is without merit. The law is well settled that petitioner had the burden of showing that his plea was entered in justifiable ignorance of his rights or the consequences of his action, or was the result of fear, coercion, fraud, mistake or inadvertence. *Kercheval* v. *United States,* 274 U. S. 220, 223-224; *Friedman* v. *United States,* 200 F. 2d 690, 696 (C. A. 8), certiorari denied, 345 U. S. 926; *United States* v. *Shneer,* 194 F. 2d 598, 600 (C. A. 3); *Williams* v. *United States,* 192 F. 2d 39, 40 (C. A. 5).

Neither in his motion to withdraw[2] nor in his petition has petitioner shown the presence of such circumstances as would warrant the granting of such a motion. In fact, as the court below said (R. 55):

> The record shows affirmatively that the defendant's plea of guilty was voluntary, that he was properly advised and warned, and that

[2] The fact that his motion was made before the imposition of the sentence did not give him any greater right to a withdrawal of his plea. *Williams* v. *United States,* 192 F. 2d 39 (C.A. 5); *Goo* v. *United States,* 187 F. 2d 62 (C.A. 9), certiorari denied, 341 U. S. 916; *United States* v. *Colonna,* 142 F. 2d 210 (C.A. 3).

> he fully understood the consequences of such a plea. There is no showing that the plea was unfairly obtained or given through ignorance, fear or inadvertence.

Even now, petitioner does not dispute (1) that he was represented by competent counsel of his own choice who, after giving full and conscientious deliberation to the case, including the matter of additional punishment because petitioner was a second offender, advised in open court that petitioner would plea guilty and (2) that the court itself accepted the plea only after it had advised petitioner in considerable detail that his maximum sentence could be twenty years and only after it has ascertained from both counsel and petitioner that they were fully aware of the significance of the plea. At the time of the motion to withdraw the plea, petitioner's counsel conceded that petitioner's plea had been entered after full advice and warning (R. 34-35).

Petitioner suggests (Pet. 4, 6-7) that the plea was made in reliance of the court's statement that it would hear counsel "in mitigation" after the plea was made and that no such opportunity was given him. At the outset, however, the court made it crystal clear, that, although it would give consideration to what was said in mitigation, it would not bargain in return for a plea of guilty. As appears from the Statement, *supra,* petitioner's counsel did in fact make an argument in mitigation (R. 36, 37) and petitioner did in fact receive

consideration since the court did not impose any additional penalty based on the prior convictions.

The granting of the motion for withdrawal would have prejudiced the Government for there had already been a delay of almost a year in the disposition of the case after it had once been set for trial, and, in addition, after petitioner's plea of guilty, the Government had secured the dismissal of three substantive counts in which he was charged.

In the totality of circumstances presented by the record there can be no substantial question based upon a claim of abuse of discretion. See *Stidham* v. *United States,* 170 F. 2d 294 (C. A. 8); *Katz* v. *United States,* 161 F. 2d 869 (C. A. 6), certiorari denied, 332 U. S. 846; *United States* v. *Mignogna,* 157 F. 2d 839 (C. A. 2), certiorari denied, 330 U. S. 830; *United States* v. *Fox,* 130 F. 2d 56 (C. A. 3), certiorari denied, 317 U. S. 666.

CONCLUSION

The judgment below is correct, and the petition for a writ of certiorari presents no question warranting further review by this Court. It is therefore respectfully submitted that the petition should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

JULY, 1954.

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